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No. (1)

Supreme Court, U.S.
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In The Supreme Court of the United States

FREDRIC D. LEFFLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

In addition to Petitioner and Respondent were co-defendants Kelly Johnston, David Uhrich, and Walter P. Hammond, Jr.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

FEDERAL RULE INVOLVED 1

Fed. R. Crim. P. 14 1

INTRODUCTION 2

STATEMENT OF THE CASE 3

A. Trial Court Proceeding 3

Testimony of Co-Defendant Johnston's Handwriting Expert 5

Co-Defendant Johnston's Testimony 9

Johnston's Closing Argument 12

B. Procedural History 13

C. Court of Appeals Opinion 14

REASONS FOR GRANTING THE WRIT.....15

CONCLUSION.....20

APPENDIX

Opinion of
The United States Court of Appeals
for The Fourth Circuit
entered June 1, 2007 .....App. 1

Judgment in a Criminal Case of
The United States District Court
for the District of Maryland
entered April 29, 2005 .....App. 30

TABLE OF AUTHORITIES

Page(s)

Cases:

Schaffer v. United States,
362 U.S. 511 (1960) 19

United States v. Balter,
91 F3d 427 (3d Cir. 1996) 18

United States v. Buena-Lopez,
987 F.2d 657 (9th Cir. 1993) 18

United States v. Mietus,
237 F.3d 866 (7th Cir. 2001) 17

United States v. Romanello,
726 F.2d 173 (5th Cir. 1984) 16, 17

United States v. Solomon,
2007 U.S. Dist. LEXIS 30511 (D. Pa. 2007) . 17

United States v. Tootick,
952 F.2d 1078 (9th Cir. 1991) 16, 18

United States v. Volpe,
42 F. Supp. 2d 204 (E.D.N.Y. 1999) 18

United States v. Woods,
210 F.3d 70 (1st Cir. 2000) 17

Zafiro v. United States,
506 U.S. 534 (1993) ..... *passim*

Statutes:

18 U.S.C. § 1341 13

18 U.S.C. § 1343 13

28 U.S.C. § 1254(1) 1

Rules:

FED R. CRIM P. 14 ..... 1, 15

SUP. CT. R. 13 1

Petitioner, Frederic Leffler, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit was issued on June 1, 2007. (App. 1). The Order of the United States District Court for the District of Maryland was issued on April 29, 2005. (App. 30)

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on June 1, 2007. (App. 1). This petition is filed within 90 days of entry of judgment. Therefore, the jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 13.

FEDERAL RULE INVOLVED

Fed. R. Crim P. 14

Rule 14. Relief from Prejudicial Joinder

(a) Relief. If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

(b) Defendant's Statements. Before ruling on a defendant's motion to sever, the court may order an attorney for the government to deliver to the court for in camera inspection any defendant's statement that the government intends to use as evidence.

INTRODUCTION

In this case, Petitioner, Fred Leffler, an attorney, was tried with his former client, co-defendant Kelly Johnston. While the government's physical and testamentary evidence showed that Johnston committed illegal acts, the case against Leffler was based upon inferences and circumstantial evidence of guilty knowledge. Johnston, unrestrained by the limitations and standards applied to the government, relentlessly pursued a defense calculated to exculpate her by attacking and convicting Leffler. First, during the government's case in chief, Johnson ambushed Leffler with expert testimony that, while proffered to rebut the government's allegations against her, instead introduced evidence against Leffler that was completely irrelevant to the government's charges and inadmissible if offered by the government.

As the trial progressed, the evidence cumulated against Johnston. After Leffler rested his case and was prohibited from responding, Johnston took the stand and admitted that she had, in fact, committed the acts alleged, but that she acted on the advice of her attorney, Fred Leffler. Thus, by presenting the affirmative, advice of counsel defense, Johnston forced a jury decision between the two co-defendants: If the jury believed that Leffler advised

his client to commit illegal acts, it was compelled to convict Leffler, but to acquit Johnston. In the end, the jury acquitted Johnston on 13 of 19 counts and convicted Leffler on all counts.

STATEMENT OF THE CASE

A. Trial Court Proceeding

Petitioner Frederic Leffler, an attorney, represented a real estate title company that was owned by his client and co-defendant, Kelly Johnston. Other co-defendants were David Uhrich, and Walter P. Hammond, Jr. At trial, the Government presented a case of mortgage fraud in which it billed Defendant Walter Hammond as the "mastermind" and "generator of the criminal activity."[1]

Hammond's scheme played out as follows: Through a limited liability company, Guardian Foundation, LLC ("Guardian"), Hammond agreed to purchase run down Baltimore City rental houses for prices that averaged $5,000 - $15,000 per house. Hammond and co-defendant David Uhrich recruited a number of "investors" who, in exchange for a payment from Hammond of $1,000 - $2,000 per house, agreed to make application for mortgage loans and to represent

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[1] Two weeks into the six week long trial, Hammond suddenly pled guilty and, under a plea agreement with the Government, testified at length about his real estate "flipping" scheme and his defrauding of lending institutions.

themselves as "buyers" of the houses. Settlement on Hammond's purchase of a house and on his subsequent sale of the same house to an "investor" usually took place on the same day, at the title company owned by co-defendant Johnston.

Hammond promised his "investors" that he would pay all expenses (down payment, closing costs, and mortgage payments), manage the rental houses, and collect rents. The "investors" paid nothing. Eventually, Hammond promised, he would transfer the properties into the name of a corporation in his control. Hammond stopped making the mortgage payments and the loans went into default.

At the heart of Hammond's fraud was the mortgage loan. Hammond secured fraudulent appraisals, inflating the value of the subject houses several times. Mortgage brokers, working with Hammond, created fraudulent mortgage applications, which were submitted to lenders along with the fraudulent appraisals. Thus, for example, a house that Hammond purchased for $5,000 was represented on a loan application as having a value of $40,000. In turn, a lender would advance 80% of the property's value, which Hammond pocketed. At settlement, Hammond himself arranged for the down payment, supplying the "investor" with a cashiers' check in the amount of the 20% down payment required.

At first, Hammond used the proceeds from earlier property sales as the source of down payment funds. Eventually, Hammond testified, Defendant Kelly Johnston, title company president, informed

him that certain lenders did not require a cashier's check at settlement. Armed with this information, Hammond simply "netted out" the transaction, reducing the loan proceeds by the down payment amount. At other times, Hammond testified, Johnston took money from the borrower's escrowed loan proceeds in advance of settlement, cutting a check from the title company escrow account to Hammond's company in the amount of the down payment. Hammond then took the title company check to a nearby bank, deposited it into his account, purchased a certified check for the down payment amount, and brought the cashier's check back to the settlement table, making it appear that his "buyer" had made the required down payment. It was in this illegal use of title company escrow funds that co-defendant Johnston was thoroughly implicated.

Testimony of Co-Defendant Johnston's Handwriting Expert

To prove that Kelly Johnston wrote checks from the title company escrow account to Hammond's company for the purpose of allowing the "investors" to make down payments at settlement, the Government produced a number of the checks. To counter the Government's evidence showing Johnston's signature on these incriminating checks (drawn on the Performance Title Company escrow account and made payable to Walter Hammond) Johnston named a handwriting expert to analyze the checks and to testify that certain signatures were not hers. As Johnston's lawyer explained to the Court: "[The Government] intends to introduce certain documents; and they're going to claim Ms.

Johnston signed those documents. * * * Ms. Johnston didn't sign those documents. . . . I'd like to have a witness say, it's not even close."

To accommodate the expert's schedule, Johnston's handwriting expert appeared during the Government's case in chief. Lawyers for Johnston's co-defendants were given the expert's report for the first time at the moment Johnston's expert took the witness stand.[2] The expert testified that she had examined purported signatures of Defendant Johnston on a number of title company checks and, after comparing those signatures to known exemplars of Johnston's signature, the expert questioned the authenticity of Kelly Johnston's signatures.

As the expert's testimony unfolded, it became clear that the checks upon which she had been asked to opine were *not* checks relied upon by the Government and had nothing whatsoever to do with the Government's allegation that Johnston had improperly drawn title company escrow checks to Hammond. Rather, the checks reviewed by Johnston's expert were drawn on the title company *operating account* and made out to Arch Property

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[2] That these matters had been handled between Johnston and the Government seemed, at the time, unremarkable, as the issues to be addressed by the expert (as represented by Johnston's lawyer) were to relate only to Johnston's exculpatory allegation that her signature on incriminating checks had been forged.

Services, Inc., an entity wholly owned by Petitioner Fred Leffler.[3]

In fact, none of the checks questioned by the expert were among those relied upon by the Government. The alleged inauthentic checks had nothing to do with, and were completely irrelevant to, the Government's case. Nonetheless, the evidence was overwhelmingly prejudicial to Leffler, in that it suddenly and unexpectedly suggested that checks payable to his company might have borne forged signatures.

Having reviewed the expert's report (which review was denied to Leffler), the Government opportunistically pounced, driving home on cross-examination of the expert a completely new and uncharged accusation – that checks written to Leffler's company contained questionable, and perhaps forged signatures.

Because he had not received the expert's report in advance of her testimony and thus, had learned for the first time during her testimony that all of the checks at issue were from the title company operating account and had nothing to do with Walt Hammond, Leffler's counsel told the Court: ". . . I have been sandbagged . . . on an antagonistic

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[3] Leffler's legitimate fees for document preparation and other services were paid to Arch Property Services, Inc., an entity undisputedly owned by Leffler. One of the Government's theories was that payments of Leffler's fees to Leffler's company was somehow a badge of fraud.

defense that I never saw coming and certainly couldn't have seen coming as I was handed this report at the same time the jury was handed it."[4]

Even the prosecutor (although certainly delighted) was somewhat taken aback, remarking at sentencing that "everyone was surprised at what his handwriting expert had to say about Mr. Leffler, because [Johnston's counsel] didn't produce any discovery to [Leffler's attorney]." In response, the Court recognized that Johnston's expert had put Leffler in a "very precarious position," stating:

> . . . you are in a difficult position in terms of the cross-examination by the government, which has now laid the foundation, among other things, for an argument that Mr. Leffler had a kind of involvement here that up until now at least, frankly, I don't think there was much evidence for.
> Now, there is a basis in this record for an argument that Mr. Leffler forged Ms. Johnston's signature.

When counsel for Johnston claimed that he had no intention of arguing that Leffer had forged checks, the Court replied: "*you don't have to argue*

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[4] The Court agreed, later remarking to Leffler's counsel: "the whole issue that you quite properly address in your [severance] memorandum about the signature issue on the operating account. I agree with you that that was really a -- well, *you could not possibly have anticipated that*." (Emphasis added).

that Mr. Leffler forged that signature for the inference to be hanging out there to the jury that Mr. Leffler was culpably involved with somebody in ripping off Performance Title." (Emphasis added). Furthermore, the Court stated, "Mr. Smith [Leffler's lawyer] should have been told what he was not told, namely that some of the checks that [the expert] was shown and on which she bases her conclusion, were checks payable to Mr. Smith's client."

Co-Defendant Johnston's Testimony

Throughout the trial, the Court imposed a strict order in which defendants cross-examined Government witnesses and then put on their respective cases. Once a defendant completed cross-examination of a witness he or she was not allowed re-cross. When a defendant rested his or her case, the trial court allowed no additional presentation or evidence. In this order, Leffer was next to last; Johnston was last.

Leffler rested his case without testifying. Defendant Kelly Johnston then took the stand and testified – bluntly and expansively – that she had, in fact, committed criminal acts, but that she had done so only on the advice of her lawyer, Petitioner Fred Leffler. Among other things,[5] she testified that Leffler had approved, on a number of occasions, her

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[5] Johnston even dovetailed her testimony with that of her handwriting expert, pointing out that "I found that someone had signed my name to a couple of checks, . . . I noticed it, I believe, *on the operating account* . . .." (Emphasis added).

disbursement of loan proceeds to Hammond before settlement, by way of a check from escrow, in order that Hammond could take that check to his own bank and come back to the settlement table with down payment funds.

To buttress her story, Johnston testified that, at the time Petitioner Fred Leffler advised her to break the law, others were present, namely title company employees Susanne Lokey and Ann Morris Chaillou. But when Ann Morris testified earlier, as a witness for Johnston, she was asked about none of this. Nor was Susanne Lokey, who also testified earlier, on behalf of Fred Leffler. Thus, by virtue of the order in which the Defendants presented their cases, Johnston was able to testify with impunity, knowing that Leffler had rested and that the Government had no incentive whatsoever to recall these witnesses in rebuttal.

Arguing that he had been "ambushed" by the Johnston testimony, counsel for Fred Leffler asked for leave to re-open his case. The Court acknowledged the novel issue presented:

> The fact of the matter is to have co-defendants in the context of sort of a business fraud prosecution where defendant number 3, Ms. Johnston, is the client of defendant number 2, who is an attorney and was the attorney for defendant number 3. That's a unique situation, and I think unique situations call for unique responses.

When Johnston's attorney argued that the testimony he had just elicited was "not particularly crippling" to Leffler, the Court replied:

> I think it has been *absolutely devastating*, . . . It's not up to me, but it has been absolutely devastating. *Absolutely devastating*. It may be that I will have to write an opinion about this.

(Emphasis added).

The Court went on:

> *What we have here is not just defendants pointing the finger at each other*, but we have a case in which the client of a defendant, who is an attorney, puts on her case last, where that defendant has elected not to testify and, indeed, put on no substantive evidence really to speak of, where Ms. Johnston now gets on and says Mr. Leffler did the whole thing, it was all Mr. Leffler.

(Emphasis added).

The next trial day, Leffler submitted a Renewed Motion for Severance, supplementing his earlier motion. After argument, the Court rejected severance and also rejected Leffler's request to re-open his case or to present a rebuttal case. Instead, the Court simply allowed a reversal of the order of the co-defendants' closing arguments.

Johnston's Closing Argument

In closing, Kelly Johnston's counsel again donned his "second prosecutor" hat, portraying Johnston as having done *nothing* without the advice of her lawyer: "[Kelly Johnston] looked to Fred Leffler," who "embraced" Hammond's fraudulent scheme. "What more could she rely on? where did she have to go for advice?" "If there were questions of law, she asked her lawyer." Furthermore, argued counsel, "Fred Leffler taught Kelly how to do those transactions . . . When Hammond wanted to use proceeds to get a check, Kelly asked Leffler, and he approved it."

Johnston was completely reliant upon Leffler, argued counsel: "If she needed advice, she asked her lawyer." "He was aware about what was going on." "Did Kelly Johnston know there was a crooked scheme? Kelly knew there was a business plan blessed by her lawyer."

The effect was devastating to Leffler. By confessing to the *actus reus* of crimes, but denying *mens rea* by way of the affirmative advice-of-counsel defense, Defendant Johnston exculpated herself at Leffler's expense. And to be sure, Johnson's lawyer stressed the point in closing: "Reliance upon her attorney's advice negates the fraudulent intent, even if the advice is wrong." "She relied on her lawyer's advice. No intent." "She said, is this right?" "She was told yes."

And, it appears, the jury at least partially believed Johnston's testimony that Leffler counseled his client to break the law, as it acquitted Johnston on 13 of 19 counts while convicting Leffler on all. At sentencing, the Court remarked: "*There is a rational explanation . . . of the jury's fact finding here. I think Ms. Johnston made a very compelling case in casting blame on Mr. Leffler.*" Arguing at sentencing that his client should be given some credit for assisting the government, Johnston's lawyer argued: "The most damaging witness against Fred Leffler was Kelly Johnston. She got them their conviction."

B. Procedural History

By superseding indictment, Petitioner Frederic Leffler was charged with six counts of mail fraud, in violation of 18 U.S.C. § 1341 and eleven counts of wire fraud, in violation of 18 U.S.C. § 1343. His initial appearance in the United States District Court of Maryland was on June 26, 2003. On May 27, 2004 after a six week trial, a jury returned guilty verdicts against Mr. Leffler; and on April 29, 2005, the District Court imposed a 37 month sentence. Mr. Leffler noted a timely appeal on May 5, 2005 and on May 18, 2005, the Fourth Circuit Court of Appeals consolidated Leffler's appeal with those of his co-defendants, David Allen Uhrich and Kelly Johnston. After oral argument on December 1, 2006, the Fourth Circuit entered judgment, affirming Petitioner's convictions, on June 1, 2007.

C. Court of Appeals Opinion

In a conclusory, three page opinion[6] the Fourth Circuit affirmed the District Court, reciting the familiar refrain of having weighed the "possible prejudice to the accused" against the "avoidance of needlessly duplicative trials." Appendix at 16.

On the issue of the co-defendant Johnston's handwriting expert, who testified for no purpose other than to smear Leffler on matters outside the indictment, the Court noted that "neither the government nor Johnston suggested that Leffler forged the checks." *Id.* But this ignores even the trial Court's on the ground observation: "you don't have to argue that Mr. Leffler forged that signature for the inference to be hanging out there to the jury that Mr. Leffler was culpably involved with somebody in ripping off Performance Title."

Event acknowledging the conflict between Leffler's defense that he lacked knowledge of Johnston's illegal activity (namely, the improper use of escrow funds) and Johnston's defense, spelled out in ter testimony that she committed criminal acts on the advice of her lawyer, Leffler, the Court found, without explanation, that Leffler failed to demonstrate a conflict of defenses with his co-defendant that would justify severance.

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[6] The Court's opinion addresses the appeal issues raised by all three co-defendants in the consolidated appeal.

REASONS FOR GRANTING THE WRIT

This Court has not visited the areas of prejudicial joinder and severance since *Zafiro v. United States*, 506 U.S. 534 (1993), where the Court considered the question, "whether Rule 14 requires severance as a matter of law when co-defendants present 'mutually antagonistic defenses." *Id.* at 535. There, while rejecting the adoption of such a *per se* rule, the Court acknowledged a range of circumstances in which mutually antagonistic defenses might mandate severance, "if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id.* at 539. For example, stated the Court, "evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty." And, "when many defendants are tried together in a complex case and they have markedly different degrees of culpability, this risk of prejudice is heightened." *Id.*

The facts of *Zafiro*, however, did not remotely present such circumstances. 506 U.S. at 540. There, when two co-defendants in possession of a large box were approached by federal agents, they dropped the box and ran into an apartment. Agents in pursuit found drugs in the apartment and in the dropped box. Both co-defendants claimed to be innocent bystanders who knew nothing of box's contents or the illegal drugs in the apartment.

Concurring in the *Zafiro* decision, Justice Stevens observed that there, the co-defendants defenses were consistent: it was entirely possible for the jury to believe both defendants in their assertion of "dual ignorance" - - that neither had knowledge of the contents of the box. And significantly, nothing in either co-defendant's defense supplemented the government's proof of any defendant's guilt in any way. *Id.* at 542. As a result, explained Justice Stevens, the *Zafiro* Petitioners could establish no prejudice flowing from the trial court's denial of severance. Significantly, however, Justice Stevens opined that the Court must "save for another day evaluation of the prejudice that may arise when the evidence or testimony offered by one defendant is truly irreconcilable with the innocense of a co-defendant." *Id.* at 543. The "very different situation" that concerned Justice Stevens is where "mutually exclusive defenses transform a trial into more of a contest between the defendants than between the people and the defendants." *Id.* at 543. (citations omitted).

In such a case, "joinder may introduce what is in effect a second prosecutor into a case, by turning each co-defendant into the other's most forceful adversary." *Id.* Furthermore, "[t]he existence of this extra prosecutor is particularly troublesome, because defense counsel are not always held to the limitations and standards imposed upon the government prosecutor." 506 U.S. at 5444 n.3 (citing *United States v. Tootick*, 952 F.2d 1078, 1082 (9th Cir. 1991); *United States v. Romanello*, 726 F.2d 173 (5th Cir. 1984)).

In the years following *Zafiro*, Courts deciding issues of severance have tended to look no further than the *Zafiro* Court's expression of a "preference in the federal system for joint trials of defendants who are indicted together,"[7] *Zafiro*, 506 U.S. at 537. Many courts seem to have misread *Zafiro*, understanding its holding to mean that antagonism between defendants can never justify severance. *See, e.g., United States v. Mietus*, 237 F.3d 866, 874 (7th Cir. 2001)("we are not convinced that *Romanello's*[8] holding that prejudice in a joint trial can be shown when one defendant strongly attacks another survives *Zafiro*"). Other courts have held that, to require severance, defenses must be mutually exclusive at a level higher than that envisioned in *Zafiro*. *See United States v. Woods*, 210 F.3d 70, 79 (1st Cir. 2000)("the antagonism . . . must be such that if the jury believes one defense, it is *compelled* to convict the other defendant")(emphasis in original)(citations omitted).

Still other different standards have emerged. *See United States v. Solomon*, 2007 U.S. Dist. LEXIS 30511 (D. Pa. 2007)(Mutually exclusive defenses exist when "one person's claim of innocence is

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[7] In this case, during oral argument in the Fourth Circuit, the Court asked only one question. Addressing the Government, the court posed what was seemingly the dispositive inquiry: "weren't the defendants indicted together?"

[8] *United States v. Romanello*, 726 F.2d 173 (5th Cir. 1984), cited in Justice Stevens' Zafiro concurrence.

predicated solely on the guilt of a co-defendant").[9] And, while the "second prosecutor" concern, voiced in Justice Stevens' *Zafire* concurrence, continues to enjoy some currency, *see United States v. Volpe*, 42 F. Supp. 2d 204, 210 (E.D.N.Y. 1999)(severance may be requited where, "in effect, a defendant's counsel becomes a second prosecutor. . . ." (quoting *United States v. Tootick*, 952 F.2d 1078 (9th Cir. 1991)) (internal quotations omitted), other opinions question the continued vitality of the theory. *See United States v. Buena-Lopez*, 987 F.2d 657, 660-61 (9th Cir. 1993); *see also United States v. Balter*, 91 F3d 427, 434 (3d Cir. 1996)(after *Zafiro*, no severance based on *Tootick* "second prosecutor" theory).

This petition presents a stunning example of the scenario that concerned Justice Stevens, and thus presents the court with a vehicle by which to refine the general rule of *Zafiro* and to provide guidance and consistency in a case where one co-defendant's adversarial stance generates trial conditions so prejudicial to the defendant under attack as to deny a fair trial.

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[9] This standard, of course would have spelled severance for Leffler.

This case illustrates the sort of antagonist defenses which, if left unchecked, build throughout the trial toward an unfair degree of prejudice.[10] Petitioner Fred Leffler's co-defendant and former client first called a expert handwriting expert, not to exculpate herself by casting doubt on incriminating documents bearing her signature, but only to smear Leffler with the suggestion that Johnston's signature might have been forged on certain checks where the payee was a corporation owned by Co-Defendant Leffler – a matter never alleged by the Government and not a part of the case against Leffler. Then, Johnston vigorously pursued an affirmative, advice of counsel defense, admitting that she committed illegal acts, but claiming to have done so only on the advice of her lawyer. This truly is a case where Johnston's defense, if believed,[11] required the jury to convict Leffler in order to acquit Johnston.

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[10] A trial court has a "continuing duty at all stages of the trial to grant severance if the requisite degree of prejudice appear[s]." *Schaffer v. United States*, 362 U.S. 511, 516 (1960).

[11] Indeed, it appears that the jury did believe Johnston to some degree, acquitting her on most counts while convicting Leffler on all.

CONCLUSION

Over a decade after *Zafiro*, it is desirable that this Court take up the question reserved by Justice Stevens and to guide lower courts in balancing judicial efficiency with fairness to defendants who face a greater and less restrained attack from a co-defendant than from the government

For the foregoing reasons, Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Dated: August 30, 2007

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